91-359

IN THE

SUPREME COURT OF THE UNITED STATES

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THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL, JUAN ORTIZ, AND NICHOLAS LA PORTE, JR.,

Petitioners,

v.

DR. JUDITH PIESCO,

Respondent.

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Brief In Opposition to Petition for Certiorari to The United States Court of Appeals For the Second Circuit

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Under the First Amendment protected speech component, does an employee of the executive branch of state government, testifying under oath before a state legislative oversight committee on matters of public concern, have a duty to shade her sworn response to questions posed, in order to conform to the political objectives of the employer, upon pain of adverse personnel action.

COUNTER-STATEMENT OF THE CASE

The United States District Court for the Southern District of New York, in its decision dismissing the complaint, ruled that although Dr. Piesco was testifying under oath before the Governmental Operations Committee of the New York State Legislature, on matters of public concern and had a duty to answer questions truthfully, that, as a matter of law the interest of furthering the employer's agenda outweighed Piesco's duty to respond truthfully and directly in her own way to the questions posed. (A-75)

The district court also determined that the testimony of Dr. Piesco that it was possible for a functional illiterate to pass the police officer examination at the mark set was irresponsible (A-76). It further held that the superiors were

immune from suit. (A-86)

The Court of Appeals in reversing the judgment held that an employee of the executive branch, testifying under oath before a legislative oversight committee, had no duty to "shade" her testimony to conform with the political objectives of the employer upon pain of adverse personnel action (A-36) and that the district court did not accord proper weight respecting the balance of interests. It further disagreed with the district court that the testimony was irresponsible as a matter of law. (A-23) The Court of Appeals also noted that there were no affidavits by anyone with knowledge of the facts upon which to conclude that Piesco would have been discharged either for the testimony alone, her other alleged activities alone, or for a combination of both, or that the pre-discharge actions of the employer as well as the discharge itself were not retaliation for the testimony given. (A-

45) The court also held that Ortiz and LaPorte were not immune from suit. (A-53)

REASONS FOR DENYING THE WRIT

All parties, and the district court agree that Dr. Piesco was testifying as an executive branch employee under oath on matters of public concern before a legislative branch oversight committee, and that she had a duty to answer truthfully.

(a) The First Amendment and Retaliation.

Petitioner adopts the analysis of the 2d Circuit respecting this issue and will not repeat it here. One need only consider that the 2d Circuit did not grant absolute first amendment protection to legislative testimony given by every high-ranking government official under Pickering v Bd. of Education, 391 U.S. 563 (1968), nor did it hold that actual disruption of governmental operations was always necessary to justify employer acts.

The court merely indicated that important weight should be accorded sworn

legislative testimony, given without fear of retaliation, and that in this instance the district court did not appropriately weigh that factor.

Thus, for example, the 2d Circuit specifically suggested that were Dr. Piesco merely a disgruntled employee who was not subpoenaed or threatened with subpoena, (A-37) who was seeking to undermine the employer, the weight given would not be as high as in this case. The court observed that "...This case is readily distinguished from those cases where a disgruntled employee voluntarily comments upon an employment-related matter out of a personal interest." (A-32)

The 2d Circuit did not confer absolute protection to all sworn testimony before a legislative committee, nor was the testimony of Dr. Piesco given absolute protection. It merely was not given sufficient weight by the district court. It can be stated with some confidence that one could hardly think of a stronger

necessity for candor and truth than in the facts in this case. Moreover Dr. Piesco's superior, Petitioner Juan Ortiz, sat next to her at the hearing, and there is no indication that he counseled her to answer differently or to elaborate. (A-38)

In balancing the competing interests, the district court incorrectly concluded that the testimony was irresponsible, a conclusion disputed by the 2d Circuit (A-23) which issue is discussed infra. It also and failed to give appropriate weight to the forum of the legislative branch with its particular need for candor and information necessary for its legislative and oversight functions, the fact that the testimony was under oath, and that there was a direct answer to a direct question.

Moreover the 2d Circuit observed that there was no affidavit by Ortiz or LaPorte or anyone else with knowledge of the facts in support of the motion upon which to conclude that there was underminig of the effective and efficient

operations of the agency or that the testimony impeded the proper performance of Dr. Piesco's duties or that there existed any condition supported by proof that would add dispositive weight under Connick v Myers, 461 U.S. 138 (1983) (A-45) to Petitioner's side of the balance.

Neither the district court, nor the petitioners in this court have advanced any authority upon which to conclude that a high ranking employee of the executive branch testifying under oath on matters directly relating to the witness' sphere of responsibility, before a legislative branch committee which has specific oversight respecting that sphere of responsibility, has a duty to shade the sworn response a question so as to conform with the political objectives of the employer, upon pain of adverse personnel action.

One would hardly fault the elected officials of the executive branch, in a

separation of powers/checks and balances context, were they to join in a chorus of that beloved spiritual, Oh Happy Day!, upon the ensconcement by prestigious judicial edict of such a wild proposition. The Court of Appeals correctly determined that such a state of affairs would undermine the very foundations of government. (A-41)

(b) The Testimony was not Irresponsible.

The district court's conclusion that the testimony was irresponsible was based on the fact that in order to achieve a grade of 89, advocated by Piesco one had to answer 125 questions correctly and that to achieve an 85, the mark which was finally set, one had to correctly answer 119 questions. Both the district court and the petitioners have used the phrase "only six questions" to describe the difference in performance as partial justification for the conclusion reached that the testimony was irresponsible.

Additionally, the petitioners rely

heavily on their assertion that the testimony was irresponsible because Piesco's conclusions were based on her limited view that a functional illiterate would be able to achieve the passing grade through "wild guessing and sheer luck" (Fns., Pet. pp. 13, 28). Petitioners know full well that Piesco ascribed her conclusion to more than just wild guessing and sheer luck. According to her affidavits in opposition to the motion her conclusions were based on the fact that (1) the test was a four-answer multiple choice type examination with no penalty for guessing incorrectly, (2) over and above cognitive ability, the facial 25% chance in wild guessing was enhanced by elimination of obviously wrong answers, (3) the fact that the same outside expert who was hired by the Department of Personnel to produce the examination was also hired by the Police Department to tutor some of the candidates who were going to take the test, and that (4)

proctors read the instructions to the candidates. (CA360-364)

Professor Yakowitz, in support of the motion on behalf of the city, originally opined that a functional illiterate had the ability to answer 50% of the examination. When he was confronted with the opposing affidavit of Piesco setting forth the four grounds for her opposition to lowering the passmark, and that perhaps Yakowitz forgot that there was no penalty for guessing, Yakowitz responded that indeed he had considered such an element in his conclusions, then he raised his sworn estimate to the ability of a functional illiterate to answer 60%. However he continued to completely ignore the elements of elimination of obviously wrong answers, the tutoring of candidates by the developer of the examination and the fact that proctors read the instructions to the candidates at the time of the examination. Even so the professor

used the term "virtually impossible" in the initial and reply affidavits he submitted, which adjective admits the possibility.

It is totally unreasonable for the Petitioners to adhere to the assertions contained in footnote on p. 13, and again the footnote on p. 28 of the Petition which unfairly limits the basis for Piesco's conclusions to "wild guessing" and "sheer luck". The Petitioners did likewise in the Court of Appeals. Piesco's reply brief, p.7, in the Court of Appeals in response thereto specifically states:

> Appellees appear to continue ignoring the factors of excluding obviously wrong answers and the fact that the preparer of the examination also tutored some of the candidates as those factors impact on the conclusions to be drawn. Thus at Br. 22 they allege that Piesco only indicated in her affidavit that "wild guessing" and "sheer luck" were the only considerations upon which Piesco based her analysis, and hence the possibility of a functional illiterate

> achieving a grade of 85% was at best theoretical. Unfortunately neither the Appellees or Yakowitz have made known their views respecting the factors of excluding obviously wrong answers and the tutoring of candidates by the test preparer as they relate to predictable test passers. Nor have they discussed the significantly large percentile differences shown by their own chart.

Further. the Petitioners continue to use the phrase "only six questions" as they did in the Court of Appeals, to convince this Court of the irresponsibility of the Piesco conclusions. Once again, in response to that phrase in the Court of Appeals it was pointed out in Piesco's reply brief that, according to the city's own statistical chart submitted on the motion, to gain a mark of 89 one had to answer 125 questions correctly which was achieved by 52.4% or appoximately the top half of the test takers. On the other hand a candidate with the lowered passmark of 85 had to answer 119 questions correctly which was

achieved by 70.04% of the candidates placing such succesful candidate well within the bottom third of the test taking population where one would expect to find a functional illiterate. The Court of Appeals specifically refused to subscribe to the notion of "only" six questions when it observed at A-23:

> Since such a significant percentage failed to answer those questions correctly, we fail to see how that statistic clearly undermines the veracity of Dr. Piesco's testimony. In any event, whether a functional illiterate could pass the police examination presents a material factual question which is disputed by the parties. Summary judgment is an inappropriate vehicle to resolve such factual issues.

The district court based its dismissal on the mistaken belief that the testimony was irresponsible as a matter of law. (A-77) As has been shown, there is a generous abundance of evidence to suggest that the testimony was not irresponsible.

(c) Other Conduct.

There is no affidavit by Ortiz or LaPorte that the use of foul language or any other objectionable conduct was the cause of the adverse personnel action, nor was it ever conceded by Piesco that complaints were received by other agencies. (Pet. fn. p.5). Nor is there any assertion by anyone that examinations were not given or that the large staff of the Examinations Division was not appropriately supervised by Piesco after the testimony.

The Court of Appeals correctly observed at A-45 that, "Neither Ortiz nor LaPorte has submitted affidavits explaining how their working relationship with Dr. Piesco was affected by her testimony or how the opertions of DOP were disrupted."

The observation that Piesco used the adjective "Fucking" was discounted by the Circuit Court which had before it sworn affidavits by Piesco that such an

adjective was used regularly in informal discussions not only by her and her superiors, but by other high ranking members of the executive branch as well.

For example, Piesco asserted in her opposing affidavit to the motion that the then Sanitation Commissioner Norman Steissel (now Deputy Mayor) referred to Juan Ortiz and Judith Piesco as "Fucking Idiots" and in response Piesco called Steissel a "Fucking Liar". The reaction of Ortiz, Piesco's superior, to this exchange, according to the affidavit was to congratulate Piesco and make her liaison between the Hispanic Society of the Sanitation Department, whereat she used the term, and the Department of Personnel. (CA-367) The assertion was not contradicted any reply affidavit. If the male superiors and co-workers regularly chose to use such machismo language at agency and inter-agency discussions in the presence of a female participant, they cannot retroactively be heard to complain

that the use of such language by the female somehow justified retaliation, or dismissal as a matter of law.

(d) Immunity

The Circuit Court was correct at A-49 in determining that under Harlow v Fitzgerald, 457 U.S. 800 (1982) and Anderson v Creighton, 483 U.S. 635 (1987), an official does not have immunity where the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. Ortiz, who is an attorney, and LaPorte were not immune from suit. Petitioners Ortiz and LaPorte authored and promulgated for city-wide use, Department of Personnel regulations, Guidelines for Evaluating Managerial Performance in New York City, referred to in the Court of Appeals decision at A-13. After Piesco's testimony LaPorte and Ortiz prepared two simultaneously issued and retroactive downgraded performance evaluations of Piesco covering each of the two years next

preceding the testimony. Those performance evaluations changed key responsibilities from her prior "outstanding" evaluations without consultation with Piesco as required by Ortiz' own regulations.

Prior to her dismissal and upon her complaint to the Department of Investigations an agency of Petitioner, the City of New York, a hearing was held specifically dealing with the downgraded retroactive evaluations and other harassments. With respect to the evaluations, the Department of Investigations concluded that this treatment resulted in part, from Piesco's testimony at the Goodman hearing. It recommended that Dr. Piesco receive new performance evaluations. (A-13) The senate committee at a post discharge investigation reached a similar conclusion of retroactive retaliation. (A-15) The Court of Appeals at A-53 correctly concluded that "In light of the DOI

report, it is incomprehensible how Ortiz and LaPorte reasonably could have considered their subsequent discharge of Dr. Piesco to be lawful."

In New York, administrative agency rules have the force and effect of law and are as binding on the agency as they are on the employees. Jordan v Martin, 152 NY 311 (1897); Frick v Commissioner, Department of Civil Service, 56 NY2d 777. Generally speaking rules of administrative agencies which regulate procedure affecting substantial rights of individuals may not be waived. Service v Dulles, 354 US 363; People ex rel Jordan v. Martin, 152 NY 311.

Ortiz and LaPorte both were the authors and promulgators of the regulations. They cannot be said to have been ignorant of the illegality of their actions. The Department of Investigations concluded that the evaluations were illegal and that they be redone. Both Ortiz and LaPorte declined the invitation

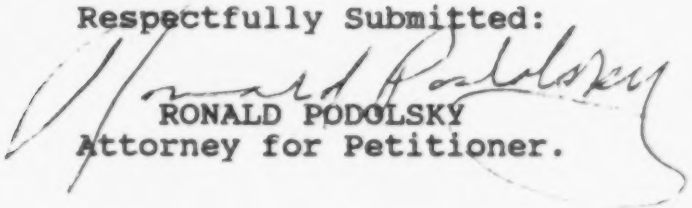
and opportunity to redo the adverse evaluations, which still repose in Dr. Piesco's file, and served as justification for the dismissal.

CONCLUSION

The Petition for a writ of certiorari should be denied.

September 14, 1991.

Respectfully Submitted:



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